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NTSB Order No. EA-4783

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of July, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-15116 and
v.)	SE-15129
)	
ROBERT L. SKLENKA and)	
ARNON OPHIR,)	
)	
Respondents.)	
_____)	

OPINION AND ORDER

Respondents appeal¹ the written initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on September 28, 1998, after a consolidated evidentiary hearing held

¹ Respondents have filed a jointly-submitted appeal brief.

on June 16, 1998.² By that decision, the law judge found that respondents violated sections 91.13(a) and 91.123(b) of the Federal Aviation Regulations ("FAR") and affirmed a 60-day suspension of respondent Ophir's airline transport pilot ("ATP") certificate and a 15-day suspension of respondent Sklenka's ATP certificate.³ We grant the appeal.

According to the Administrator's complaint:⁴

² A copy of the initial decision is attached.

³ FAR §§ 91.13 and 91.123, 14 C.F.R. Part 91, provide, in relevant part, as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

§ 91.123 Compliance with ATC clearances and instructions.

* * * * *

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

* * * * *

⁴ The wording of the Administrator's orders against each respondent, filed as the complaints in this proceeding, is identical except for identifying respondent Ophir as the captain and respondent Sklenka as the first officer, and setting forth the certificate numbers in the respective complaints.

2. On January 28, 1997, you acted as [pilot-in-command (respondent Ophir) and second-in-command (respondent Sklenka)] of a passenger-carrying Boeing 737-400 aircraft, being operated as Carnival Air Lines Flight #9, departing from Bradley International Airport, Windsor Locks, CT.
3. Said flight was conducted pursuant to Carnival Air Lines Carrier Certificate No. RIVA639B and approved operations specifications.
4. You operated Carnival Flight #9 off the airport taxiway onto a grassy area adjacent to the paved surfaces.
5. You were then instructed by air traffic control [("ATC")] to hold position.
6. You acknowledged said instruction to hold position.
7. Notwithstanding said instruction, you then operated Carnival Flight #9 back onto the taxiway, powering out through the grassy area and snowbanks.
8. You did not check the landing gear or have the aircraft inspected for damage following the rough terrain taxi prior to takeoff.
9. Operation of an aircraft in the manner and under the circumstances described above was careless and/or reckless so as to endanger the lives and property of others.

By reason of the foregoing facts and circumstances, you violated the following Federal Aviation Regulations:

- (a) Section 91.123(b), in that when no emergency existed, you operated an aircraft contrary to an ATC instruction in an area where air traffic control is exercised.

(b) Section 91.13(a), in that you operated an aircraft in a careless and/or reckless manner so as to endanger the lives and property of others.⁵

Some facts are either clearly demonstrated by the record or not seriously disputed. At approximately 2:15 am local time, in the midst of a snow storm and poor visibility, respondents taxied away from a de-icing station near the departure runway. The de-icing facility is located on a ramp which is, essentially, an extension of taxiway Charlie in that at the approach end of runway 6 the taxiway widens to the southeast (i.e., away from, but perpendicular to, runway 6/24). As it was marshaled out of the de-icing station, the aircraft was oriented so that it was necessary for respondents to taxi forward a short distance and then intercept the taxiway by making a left turn of approximately 45 degrees. Respondents taxied into the snow-covered unpaved area beyond the taxiway after failing to make the required left turn.⁶

⁵ At the hearing, the Administrator articulated three bases for the section 91.13(a) charge: taxiing the aircraft off the paved area, taxiing out of the grassy area contrary to a hold instruction while ground personnel and vehicles were in close proximity to the aircraft, and failing to inspect the aircraft for damage caused by the mishap before departing the airfield.

⁶ This area, alternatively described as grassy or sandy, and referred to frequently in the record as the "lot," is a safety area between the taxiway and the runway.

At the hearing, the Administrator called various airport personnel who witnessed the incident, as well as the investigating FAA inspector, and introduced several written statements, including those that respondents submitted to Carnival's chief pilot after the incident.⁷ Respondents, who denied any wrongdoing, both testified, and they also called as witnesses the local controller on duty the night of the incident and two Carnival employees who were onboard the aircraft. They also introduced into evidence several written statements, an aircraft maintenance log indicating that no maintenance was performed after the mishap, and a certified transcript of a recording of the local control frequency ("ATC transcript") on the night of the incident. The details of the evidence presented will be set forth during our review of the law judge's findings.

The law judge found that respondents "moved the aircraft in contravention of the hold instruction given at [02:19:10]." Initial Decision ("I.D.") at 9. He also found that respondents were careless in that they entered the lot in the first place and, also, in taxiing the aircraft out of the lot while pedestrians and vehicles were in close proximity to the

⁷ Respondent Ophir's statement also refers to an airport diagram, upon which he apparently made notations, which is also part of the record. Exhibit ("Ex.") A-3.

aircraft.⁸ On appeal, respondents contest the law judge's findings and, alternatively, they argue that the law judge should in any event have reduced their sanction because he dismissed one of the bases -- the failure-to-inspect allegation -- for the section 91.13(a) charge.⁹ We think the law judge erred in concluding that the Administrator proved that respondents violated either section 91.123(b) or section 91.13(a), as alleged in her complaint, for we do not think either charge is supported by a preponderance of the reliable and probative evidence.

We turn first to the section 91.123(b) allegation that "[n]otwithstanding [the hold] instruction, [respondents taxied] . . . back onto the taxiway, powering out through the grassy area and snowbanks." The ATC transcript includes the following transmissions between the local controller ("LC"), Flight 9 ("C9"), and a supervisor from airport operations ("OPS")

⁸ Regarding the third basis for the section 91.13(a) charge, the law judge found that there was insufficient evidence that respondents were careless in not conducting a more thorough inspection of the aircraft before initiating their takeoff. The Administrator has not appealed this determination.

⁹ In addition, respondent Sklenka claims that any sanction he might ultimately incur should be waived because, he alleges, he filed a timely report pursuant to the Aviation Safety Reporting System ("ASRS") and his counsel merely forgot to introduce this evidence. We need not address this argument in light of our resolution of this case.

transmitting from a truck (designated "state four") at or near the scene of the incident:¹⁰

[2:18:16
C9]: and ah ground this is carnival nine this
ah wondering what the plan for us cuz
we're gonna run out of holdover time for
the de-icing

[2:18:23]
LC: . . . carnival nine taxi back out ah to
the ah taxiway there

[2:18:30]
OPS: if he's able to (unintelligible)

[2:18:37]
LC: carnival nine ah if you could ah just ah
if you could make the turn back on to
the taxiway if you want to try that
there be some vehicles off your left
side there now

[2:18:44
C9]: yeah we can do that

[2:19:04]
OPS: ground state four

[02:19:05]
LC: state four ground

[02:19:09]
OPS: have him hold his position he's got a
couple people on the ground right in
front of him

[2:19:10]
LC: carnival nine just hold position

¹⁰ The OPS supervisor was transmitting over the ground control frequency. The local controller was working both the ground and tower frequencies.

[2:19:12
C9]: hold position

ATC Transcript at 8-9. Although the local controller communicated with other landing and departing aircraft over the next several minutes, and throughout the incident, the next relevant transmission occurred more than two minutes later:

[2:21:14]
OPS: ground state four

[2:21:20]
LC: state four ground

[2:21:21]
OPS: well he's out on the taxiway again if he
wants to come back and have a look he's
welcome to

Id. at 10. The local controller did not respond to this transmission, and the next transmission occurred nearly another two minutes later:

[2:23:01
C9]: bradley tower carnival nines ready

[2:23:05]
LC: carnival nine ah bradley tower runway six taxi in
position and hold

Id. at 10-11.

The Administrator contends that the 2:21:21 transmission by the OPS supervisor that Flight 9 was "on the taxiway again" demonstrates that respondents moved the aircraft from the lot after they acknowledged the 2:19:10 hold instruction. Respondents, on the other hand, both testified that they taxied

the aircraft from the lot after receiving the clearance to move and that the aircraft was back on the taxiway at the time the local controller issued the 2:19:10 hold instruction. They testified that the aircraft remained at rest on the taxiway until they called the tower for takeoff, and that during that period of time they performed checklist items and looked for evidence of control surface contamination.

The FAA inspector never interviewed the OPS supervisor or the local controller -- and the Administrator did not call these persons as witnesses at the hearing -- and therefore the task of determining the critical detail of when the aircraft regained the paved surface has been made much more difficult.¹¹ The OPS supervisor was the only eyewitness capable of providing uninterested testimony about when the aircraft moved out of the lot relative to the 2:19:10 hold instruction, for the other eyewitnesses were not monitoring the ground control frequency and the local controller testified that he did not, and probably

¹¹ One witness estimated that the aircraft was only in the lot for a "minute . . . [not] that long." Hearing Transcript ("Tr.") at 15. Other witnesses claim, somewhat vaguely, that the aircraft paused only briefly on the taxiway before continuing onto the runway. The timeline provided by the ATC transcript, however, and the short distance from the location along the taxiway where the incident occurred and the runway threshold, raise questions about the precision of these observations, but the Administrator has not adequately explained what appear to us to be important details of her case.

could not, perceive any unauthorized movement of Flight 9. The Administrator's case obviously depends upon the contemporaneity of the 2:21:21 OPS supervisor's transmission and Flight 9's regaining the taxiway, but we think it is far from a foregone conclusion that the OPS supervisor's transmission was made at precisely the moment that the aircraft taxied back onto the taxiway.¹² The Administrator, as well as the law judge, placed emphasis on the testimony of Gregory Jefferson, an airport equipment operator, that the OPS supervisor's transmission was made "as soon as [t]he [aircraft] got back up through the snow and onto the taxiway," but we think this shows little, if anything, about the transmission's contemporaneity with Flight 9's regaining the taxiway, for it does not appear to us that Mr. Jefferson intended the temporal precision for which his remark is cited. In our view, Mr. Jefferson's remark appears to be an expression of surprise that the aircraft was not inspected after its taxi through the snow. See Tr. at 60-62; see also Tr. at 122-124 (testimony of John Thompson). The Administrator thus has not adequately demonstrated the requisite contemporaneity. Nor does her evidence otherwise demonstrate that the aircraft moved

¹² The controller testified that it was as likely as not that the OPS transmission was a report made after the fact, when the OPS supervisor had returned to his truck.

out of the lot after the 2:19:10 hold instruction,¹³ for the local controller testified that OPS would have alerted him if Flight 9 taxied in the lot without authorization, but the ATC transcript indicates that this did not happen.¹⁴ In sum, we

¹³ Although evidence that the aircraft never stopped after regaining the taxiway could, if presented with other evidence such as the distance to the runway and the speed at which the aircraft taxied, tend to show that the aircraft taxied out of the lot closer to its recorded departure time, and therefore after the 2:19:10 hold instruction, the Administrator presented witnesses who contradicted each other as to whether the aircraft stopped on the taxiway after it exited the lot. Mr. Michael Gamache, an AMR Combs supervisor who helped de-ice Flight 9, wrote in a report signed approximately three weeks after the incident that after regaining the taxiway, the aircraft "never stopped once and proceeded to the runway for takeoff." Ex. A-1. At the hearing, his testimony was that the aircraft "stopped for a moment" on the taxiway. Tr. at 177. John Thompson, an airport employee, testified that when the aircraft regained the taxiway it "turned to the right heading towards the runway and it went at a slow roll [and] did not come to a complete stop." Tr. at 113. Donald Norrie, a plow operator on the night of the incident, testified that the aircraft "came out of the lot . . . and continued a slow taxi out onto the approach and . . . left." Tr. at 18. David Adams, an airport employee, testified that "once [the aircraft] got onto the [taxiway], [it] seemed to slow down . . . [and] may have stopped . . . [before it] proceeded out around the approach and then out to the runway and took off." Tr. at 145. This evidence -- although it tends to show that respondents taxied toward the runway after they acknowledged the hold instruction -- does not compel the conclusion that respondents taxied out of the lot after the 2:19:10 hold instruction.

¹⁴ We are mindful here that Mr. Gamache testified that he ran back out in front of the aircraft after it started to taxi from the lot in an unsolicited attempt to marshal it, but we are left to guess whether the OPS supervisor's reference to persons on the ground in front of the aircraft was actually speaking about Mr. Gamache as he ran backwards across the ramp while attempting to direct the aircraft. If the OPS supervisor was actually referring to Mr. Gamache -- which is our best inference from this

(continued ...)

discern insufficient evidence to support the law judge's finding that respondents taxied back onto the taxiway after the hold instruction was issued.

We now turn to the section 91.13(a) charge associated with Flight 9's initial excursion off the taxiway.¹⁵ At the time of

incomplete record -- then it is as likely as not that the aircraft was already on the taxiway when the hold instruction was issued. Given the confusion that night, and the fact that persons were running about without coordination with either the flight crew or the local controller, respondents could have thought -- especially in light of the fact that the controller's hold instructions were always issued in response to OPS requests -- that it was permissible to resume their taxi when, as respondent Ophir claimed, one of the persons on the ground gave them a "thumbs up" sign after they regained the taxiway and they observed the marshaler move out of the way. Our point here is not to condone respondents' actions if they disregarded a hold instruction after they had regained the taxiway, but, rather, to put the Administrator's proof in context with her complaint. The Administrator's complaint only faulted respondents for taxiing *out of the lot* contrary to a hold instruction, and thus that is what respondents were put on notice to defend, but her evidence, lacking as it does testimony by the local controller or the OPS supervisor about when the aircraft taxied out of the lot, is insufficient to support that charge.

¹⁵ The law judge also upheld the section 91.13(a) charge alleged in connection with the taxi out of the lot because of the "proximity of the pedestrian ground personnel and the ground operations vehicles." This conclusion, however, was incidental to his determination that respondents violated section 91.123(b). Assuming, as we must in light of our decision on the section 91.123(b) charge, that respondents taxied out of the lot before the 2:19:10 hold instruction was issued, there is insufficient evidence to support a finding that respondents carelessly disregarded the safety of the persons or vehicles in the vicinity of their aircraft. Respondents were aware of these persons and vehicles -- indeed, the controller's taxi instruction makes explicit reference to them -- and we discern nothing that proves

(continued ...)

the incident, visibility was poor, paved surfaces were covered by loose or packed snow, plow tracks traversed the border between the paved surface and the lot, and small "windrows"¹⁶ were piled near, and possibly obscuring, the taxiway lights. In upholding the violation, the law judge stated:

If the taxiway lights were visible, the crew clearly breached its duty to taxi the aircraft with sufficient care to remain on the taxiway. If, on the other hand, the taxiway lights could not be seen, the crew carelessly operated the aircraft by taxiing it without due regard for hazards that could be encountered in such poor visibility.

I.D. at 10.¹⁷ Respondents testified that they taxied the aircraft slowly as it left the de-icing station, and the Administrator's witnesses did not contradict this, and claimed that they were actively looking for the taxiway lights but never saw them. The record contains insufficient evidence to indicate

they operated their aircraft inappropriately, in this regard, under the circumstances.

¹⁶ The airport personnel who testified referred to small drifts or piles of snow as "windrows."

¹⁷ The law judge's latter conclusion does not appear to take into account the possibility -- as he appeared to acknowledge when he stated, "[t]here was some degree of disagreement among the witnesses as to . . . whether either the windrows or the falling snow had obscured the taxiway lights" -- that obscuration of the taxiway lights was not due to reduced visibility, but, rather, from being covered by snow or blocked by piled snow, or a combination of both.

that Flight 9 taxied into the lot because respondents failed to exercise due care.¹⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are granted; and
2. The Administrator's orders of suspension are dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹⁸ The Administrator argues that weather conditions cannot excuse respondents, "because . . . these pilots continued to taxi a passenger-carrying Part 121 aircraft when they could not see where they were going" which "is simply unacceptable." Administrator's Brief at 12. Respondents, however, did not testify that they could not see where they were going, but, rather, that they could not see the taxiway lights some distance ahead of them as they initiated their taxi.